Filed 4/15/03 P. v. Cueva CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE

Plaintiff and Respondent,

v.

JULIO CESAR CUEVA,

Defendant and Appellant.

F038687

(Super. Ct. No. CR31560)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorney Generals, for Plaintiff and Respondent.

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* Before Dibiaso, Acting P.J., Vartabedian, J., and Buckley, J.

Defendant Julio Cesar Cueva pleaded guilty to seven counts of residential burglary (Pen. Code, § 459)[1] and one count of misdemeanor resisting arrest (§ 148). In addition, he admitted an on-bail enhancement. (§ 12022.1,) The court sentenced defendant to six years in state prison (middle term of fours years for count one, burglary, and a consecutive two-year term for the on-bail enhancement); others counts were ordered to run concurrently. The execution of sentence was suspended and defendant was committed to the California Rehabilitation Center (CRC). The CRC warden determined that defendant was unsuitable for further participation in the civil addict program because he had absconded from parole supervision. Defendant was returned to the trial court for sentencing. At the close of the sentencing hearing, defendant stated that it was his understanding that he was to withdraw his plea. The court stated that no motion had been made in that regard and remanded defendant to the Department of Corrections.

Defendant appeals, claiming the trial court erred in denying his motion to withdraw his plea and alternatively argues his counsel was ineffective in failing to make a proper motion.

Discussion

Defendant contends the trial court erred when it refused to hold a motion on the question of whether he would be allowed to withdraw his guilty plea. First, defendant asserts he made a proper motion to withdraw his plea and the trial court had jurisdiction to entertain the motion.

"In a criminal case, judgment is rendered when the trial court orally pronounces sentence." (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 543.) The trial court orally pronounced sentence on January 2, 1992; it then stayed execution of sentence and defendant was admitted to CRC. At the hearing on June 7, 2001, the trial court

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[1] All future code references are to the Penal Code unless otherwise noted.

reimposed the original sentence and remanded the defendant to the Department of Corrections. At the conclusion of this hearing defendant stated, "It was my understanding that I was to withdraw my plea in that prior case today, Your Honor." To this the court responded: "Well that's not the Court's understanding. No motion has been made in that regard."

Defendant claims that his motion to withdraw his plea could have been made by way of a motion to vacate the judgment or by a writ of error coram nobis. "Any motions made subsequent to judgment must be made only upon written notice served upon the prosecution at least three days prior to the date of hearing thereon." (§ 1201.5.) As stated by the trial court, defendant did not make a proper motion; his oral statement was not sufficient.

Defendant continues his argument by claiming that if his motion was precluded because of the failure to follow correct procedure in the superior court, then his counsel was ineffective in failing to file the proper motion and reversal is required.

"To establish ineffective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unreasonable conduct, the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine our confidence in the outcome." (*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1272.) "Where … a claim is based on trial counsel's failure to make a motion, a defendant must prove not only the absence of a reasonable tactical explanation for the omission but also that the motion or objection would have been meritorious." (*Ibid*.)

We shall assume for the sake of argument that counsel had no tactical reason for failing to make a proper motion and shall focus on the question of prejudice.[2] "[A] defendant who pled guilty demonstrates prejudice caused by counsel's incompetent performance in advising him to enter the plea by establishing that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial." (*In re Resendiz* (2001) 25 Cal.4th 230, 253.)

Appellate counsel relies on defendant's request for a certificate of probable cause, and counsel characterizes defendant's statement as demonstrating that his initial public defender guaranteed to the defendant that his plea would not amount to a conviction because he would be deemed a narcotic addict and this is a civil commitment. This is not precisely what the certificate of probable cause states. In the request for a certificate of probable cause defendant states:

"I was told and informed by my public defender at the time that I entered my initial plea--the [Welfare and Institutions Code section] 3051 motion that was filed on my behalf that all criminal proceedings were suspended for an undetermined amount of time. That my criminal proceedings would remain suspended pending my completion *or*

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[2] Currently pending before this court is the case of *People v. Cueva* (F038329). In that case defendant's sentence was increased based on his convictions from this case that were used as strikes pursuant to section 667. Statements were made in case No. F038329 that reflect on defendant's claim that he wished to withdraw his plea in this case and that he believed his counsel represented him ineffectively during the plea proceedings. Because we have assumed for the sake of argument that his counsel had no tactical basis for failing to make a proper motion, and also find no prejudice, it is not necessary to consider the record in case number F038329. By order dated March 12, 2002 this action is to be heard at the same time and by the same panel as F038329. This is not an order consolidating the cases. But, as previously explained it is not necessary for us to consider any evidence presented in case number F038329, thus an order taking judicial notice of that file is not necessary and no request has been made.

exclusion from the California Rehabilitation Center Program. My rights were violated by my public defenders [*sic*] ineffective assistance of counsel. Barry Robinson my public defender guaranteed me that my plea *would not* amount to a conviction, because I was deemed a narcotic addict by a psychiatrists [*sic*] evaluation and was now a Civil Commitment--and was no longer a criminal matter. Barry Robinson told me that a "conviction" or "convicted" means: The *final* judgment on a verdict or finding of guilty, a plea of guilty, or nolo contede [*sic*] but *do not include* a final judgement which has been expunged by pardon, reversed, *set aside*, or otherwise rendered nugatory--such as my case! Barry Robinson told me that whenever an individual is committed to the custody of the Surgeon General for treatment under this chapter the criminal charge against him shall be continued *without final disposition* and shall be dismissed if the Surgeon General certifies to the court that the individual has succesfully [*sic*] completed the treatment program. On receipt of such certification the court shall discharge the individual from custody and dismiss the charge against him. *If* prior to such certification the Surgeon General determines that the individual cannot be further treated as a medical problem, he shall advise the court. The court shall thereupon terminate the commitment, and the *pending* criminal proceeding shall be *resumed*."

We fail to see any significant error in the advice given by counsel in the earlier proceedings. Defendant's original counsel was correct when he stated that the trial court may dismiss the criminal proceedings if a defendant has successfully completed his commitment. (Welf. & Inst. Code, § 3200.) Counsel was also correct in his advice that if a defendant does not successfully complete his CRC commitment, the defendant is returned to court for further proceedings on the criminal charges that the court deems warranted. (Welf. & Inst. Code, § 3053.)

The only statement attributed to defense counsel by defendant that would constitute misadvice is that he was guaranteed his plea would never amount to a conviction. But, defendant's "assertion he would not have pled guilty if given competent

advice 'must be corroborated independently by objective evidence.'" (*In re Resendiz* (2001) 25 Cal.4th 253.)

"In determining whether a defendant, with effective assistance, would have [rejected a plea] offer pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequence of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Although defendant has claimed that his counsel inaccurately informed him of the consequences of his plea, there is nothing in the record to support his self-serving statement. There is no evidence suggesting the prosecutor would have agreed to a plea that would have allowed defendant to avoid criminal conviction if he was unsuccessful at CRC. In addition, defendant's statements at the change-of-plea hearing do not support his contention that he plead under the false belief that his plea would not amount to a conviction. At the time defendant entered his plea the trial court asked him: "You understand the maximum sentence that could be imposed [pursuant to the plea agreement] in this case would be six years in State prison. Do you understand that?" Defendant replied yes. The court explained parole consequences, the possibility of probation, and then told defendant that the maximum possible punishment he could receive would be 15 years and four months. The court then asked: "Other than what I have just gone through, has anyone promised you anything to get you to enter a plea to these charges?" The defendant replied no. Defense counsel told the court that he had advised defendant of his rights, defenses and the possible consequences of his plea. We find it highly speculative that defense counsel would have given defendant clearly incorrect legal advice--that his plea would not result in a criminal conviction.

As stated by the trial court, defendant could have received 15 years and four months in prison. Instead he was given a much lighter sentence, and a sentence that allowed him to be considered for CRC.

Based upon our examination of the entire record, defendant fails to persuade us that it is reasonably probable his counsel misadvised him when he entered his plea. Also, defendant has not demonstrated that in the absence of any misadvice he would have insisted on proceeding to trial and would have given up the favorable outcome he obtained by pleading guilty. In hindsight, defendant now wants to avoid the adverse consequences of having convictions that subject him to increased punishment based on his recidivism. Thus, it was not reasonably probable that defendant would have prevailed on a motion to withdraw his plea or a petition to vacate the judgment; he fails to demonstrate prejudice.

Disposition

The judgment is affirmed.